Table of Authorities Cited

Cases

	Pages
Bailey v. Baker Ice Machine Co., 239 U.S. 268, 36 S. Ct. 50, 60 L.Ed. 275 (1915)	7, 9
Carina Mercury, Inc. v. Ingaravides, 344 F.2d 397	5, 6
Dissing v. Jones, 85 Ariz. 139, 333 P.2d 725 (1958)	10, 11
England v. Moore Equipment Co., 94 F. Supp. 532 (N.D. Cal. 1950)	9
In re Lake's Laundry, Inc., 79 F.2d 326 (2nd Cir. 1935)	9
Kahl v. Winfrey, 81 Ariz. 199, 303 P.2d 256 (1956)	9, 16
Lewin v. Telluride Iron Works Co. (8th Cir.), 272 F 590 (1921)	7
McKnight v. M. & J. Finance Corp., 247 F.2d 112 (4th Cir. 1957)	9
Moore v. Chilson, 26 Ariz. 244, 224 P. 818 (1924)	2
Cancio Perez v. Jose Claudio and South Porto Rico Sugar Co. of P.R., 48 P.R.R. 559 (1935)	6
Seckler v. J. I. Case Co., 141 Colorado 395, 348 P.2d 368, Cert. Den. 363 U.S. 819, 80 S. Ct. 1258 (1960)	6
Weiss v. Saffell, 82 Ariz. 316, 313 P.2d 390 (1957)	9

Statutes

Civil Code of Puerto Rico (1930):	
Puerto Rico Conditional Sales Act of April 13, 1916, Title 10, L.P.R.A., Section 32	3
28 U.S.C. Section 1254(1)	2
Bankruptcy Act:	
11 U. S. Code, Section 1(30)	3
Section 24 (11 U.S.C.A., Section 47)	2

Pages

Section 60 7
Section 60(a) 3
Section 60(b) 3
Section 60(a)(b) (11 U.S.C., Section 1(30)) 2, 4

Arizona Revised Statutes (1956):
Sections 44-301, et seq. 5
Section 44-301(1)a 3
Section 44-304 3
Section 44-305 ..... 2, 3, 4, 5, 6
Section 44-309 3
Section 44-329 3

Miscellaneous

3 Collier on Bankruptcy:
Section 60.43 3
Section 60.43(2) (14th Ed.) 9
Page 995 11

4 Collier on Bankruptcy:
Page 1800, Note 38 3

Senate Report No. 1395, 1952 U.S. Code Cong. and Admin. News at 1963 9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 1210

MASSEY-FERGUSON, INC., a corporation,
Petitioner,

vs.

H. W. GLESSNER, Trustee in Bankruptcy of Marvin K. Dunagan, Bankrupt,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 353 F.2d 986. The opinion of the District Court is unreported. Both are reproduced in the appendix, as is a copy of the judgment of the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1965. Rehearing was denied on January 19, 1966. The Petition for Writ of Certiorari was filed on the 12th day of April, 1966. The Respondent was granted until May 25, 1966, to file a response to said petition.

The jurisdiction of the Court is found in Section 24 of the Bankruptcy Act, 11 U.S.C.A., Section 47, and under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

The Respondent sets forth the following questions as more accurately and completely describing the issues before this Court.

1. Is the retaking of goods by a conditional vendor, which has the legal[1] effect of notice or recordation, a "transfer" within the scope of Section 1(30) of the Bankruptcy Act, and therefore, voidable under Section 60(a)(b) of the Act where all other classic elements of a preference are present?

2. Is the retaking of goods, sold under an unrecorded conditional sales contract, by the conditional vendor a voidable preference within the provisions of Section 1(30), Section 60(a)(b) of the Bankruptcy Act, and A.R.S. 44-305?

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[1] *Moore v. Chilson*, 26 Ariz. 244, 224 P. 818 (1924).

STATUTES INVOLVED

United States Bankruptcy Act (Title 11 U.S. Code):

Section 1(30)
Section 60(a)
Section 60(b)

Arizona Revised Statutes (1956):

Section 44-301(1)a
Section 44-304
Section 44-305
Section 44-309
Section 44-329

Civil Code of Puerto Rico (1930):

Puerto Rico Conditional Sales Act of April 13, 1916, Title 10, L.P.R.A., Section 32.

AUTHORITIES

Collier on Bankruptcy, Volume 3, Section 60.43.

Collier on Bankruptcy, Volume 4, Page 1800, Note 38.

STATEMENT

The case is concerned with the retaking of property by a conditional vendor (Petitioner) within four months of the adjudication of bankruptcy of Marvin K. Dunagan. The Respondent is the bankrupt's duly appointed, acting, and qualified Trustee in Bankruptcy. He sued to recover the value of the goods retaken in a plenary action in the United State Dis-

trict Court. The Petitioner had never filed nor recorded its "security instruments" in accordance with Arizona law, and rights created by A.R.S. 44-305 therefore vested in the Trustee in Bankruptcy as an attaching creditor.

The Petitioner retook personal property, farm machinery, from the bankrupt, one of its dealers, where the lower courts have found as a matter of fact and law all the classic[2] elements of a preference under Section 60(a)(b) of the Bankruptcy Act existed. The District Court did not find that a "transfer" had taken place. The Court of Appeals reversed, and held that under Sections 1(30) and 60(a)(b), a transfer of the bankrupt's property did occur and that a "secret lien" was approved to the detriment of the general creditors of the bankrupt.

ARGUMENT

The arguments of the Petitioner having been presented first, they will be answered in the same order as presented.

---

[2]The elements of a preference are as follows:

1. There must have been a transfer to a creditor;
2. The transfer must diminish the estate of the debtor;
3. The transfer must be made for an antecedent debt;
4. The creditor-transferee must have obtained a greater percentage of his debt than some other creditor of the same class;
5. The transfer must have been within four months of the bankruptcy;
6. The debtor must have been insolvent; and
7. The creditor must have had reasonable cause to believe the debtor was insolvent at the time of the transfer.

I

IT IS CLAIMED THERE IS AN "ADMITTED CONFLICT BETWEEN THE CIRCUITS".

Senior District Judge Mathes in the decision below stated:

> "Under the circumstances at bar, repossession by a conditional seller of property subject to a conditional sale agreement, within the four-months period next preceding filing of the petition in bankruptcy, constitutes a preference recoverable by the trustee under § 60b of the Bankruptcy Act [11 U.S.C. § 96(b).]"

The decision of the Ninth Circuit and the Trial Judge in the District Court held that the Conditional Sales Act of Arizona, A.R.S. 44-301, et seq., applied to the instant case.

In *Carina Mercury, Inc. v. Ingaravides,* 344 F.2d 397 at 399, the First Circuit ruled under the law of Puerto Rico that "Under the circumstances the Puerto Rico Conditional Sales Act . . . can have no application."

The law of Arizona and Puerto Rico when applied to the case before the Court are remarkably different and readily show no conflict in the Federal law.

The State of Arizona in A.R.S. 44-305 states:

> "Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof

> shall be filed as hereinafter provided, and is void as to all persons except for the buyer unless such contract or copy is so filed within ten days after the making of the conditional sale."

Puerto Rico has ruled in the cases cited in *Carina Mercury* at page 400, *supra,* that:

> "An attaching creditor is not a third person within the meaning of the law, and acquires no greater right to property attached than the debtor, whom he succeeds."

This is obviously not the situation in Arizona where there has not been recordation in compliance with A.R.S. 44-305.

The *Carina* case, *supra,* cites *Cancio Perez v. Jose Claudio and South Porto Rico Sugar Co. of P.R.,* 48 P.R.R. 559 (1935). This case, part of the foundation of the decision for the First Circuit at page 565 states:

> "That statute was enacted precisely for the purpose of facilitating loans . . . it tends to establish greater guarantees in favor of the lender."

There is no special privilege in Arizona which the Petitioner here can look to. The Court further held at page 400 that a Trustee in Bankruptcy is not a "Third party entitled to the protection of the Conditional Sales Act," which Act is *not* the same as Arizona's Act.

The Petitioner refers to *Seckler v. J. I. Case Co.,* 141 Colorado 395, 348 P.2d 368, Cert. Den. 363 U.S. 819, 80 S. Ct. 1258 (1960). This case apparently rests

upon *Lewin v. Telluride Iron Works Co.*, 8th Cir., 272 F. 590 (1921), which states clearly, at page 595, that under the law of Colorado, "A judgment creditor with an execution returned unsatisfied has no lien upon any property of his debtor in Colorado," and therefore, neither does a Trustee in Bankruptcy in that position. It is pointed out that the *Lewin* case, *supra,* went off on the issue of "title" of the Trustee under Section 70(a) of the Bankruptcy Act, and was not tried or decided on the grounds of a preference. The case is clearly distinguishable, and is another interpretation of state law, which state does not give attaching creditors (or those who could attach as the Trustee), the rights Arizona does.

II

THE PETITIONER CONTENDS THAT THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT. THIS ARGUMENT IS A RESTATEMENT OF THE PETITIONER'S UNDERSTANDING OF BAILEY v. BAKER ICE MACHINE CO., 239 U.S. 268, 36 S. CT. 50, 60 L.ED. 275 (1915).

The Court below in discussing legislative history points out clearly that since 1915 many changes have occurred in the Bankruptcy Act which affects this case, these amendments being the 1950 and 1952 amendments to Section 60 of the Bankruptcy Act.

As the Court of Appeals stated in its decision:

> "However, the 1950 and 1952 amendments to the Bankruptcy Act convince us that the *Bailey* doctrine no longer subsists. In 1950, the Congress amended § 60 to define more precisely the time of

a 'transfer' within the meaning of § 60(a) and (b), by providing in § 60a(2) that:

> 'For the purposes of subdivisions (a) and (b) of this section [60], a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee.' [64 Stat. 24 (1950); 11 U.S.C. § 96(a)(2).]

"Section 60a(7)(I) allows the creditor twenty-one days, unless the State law fixes a shorter period of time, within which to perfect the creditor's interest so that no lien described in § 60a(7)(II) can become superior to the creditor's rights in the property. [11 U.S.C. § 96(a)(7)(I).] And § 60a(7)(II) provides:

> 'Where compliance with the law applicable to the transfer is not had in accordance with the provisions of sub-paragraph I, the transfer shall be deemed to be made or suffered at the time of compliance therewith.' [11 U.S.C. § 96(a)(7)(II).]

"In 1952, the Congress amended § 1(30) to include a contract of conditional sale within the statutory definition of a 'transfer' by expressly declaring that 'the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.' (66 Stat. 42 (1952), 11 U.S.C. § (30).]"

The amendment in the language of Section 1(30) of the Bankruptcy Act is directly in point on the case

at issue, and it is respectfully submitted that the statutory amendments show that the Court of Appeals did not render a decision contrary to the decisions of the Supreme Court.

The Petitioner states that the doctrine of *Bailey v. Baker Ice Machine Co., supra,* does not result in an anomaly. The anomaly does exist between conditional sales and chattel mortgages as is shown in the following cases: Compare *McKnight v. M. & J. Finance Corp.,* 247 F.2d 112 (4th Cir. 1957) and *England v. Moore Equipment Co.,* 94 F. Supp. 532 (N.D. Cal. 1950), with *Bailey v. Baker Ice Machine Co., supra,* 239 U.S. 268. See L. Hand, J., dissenting in *In re Lake's Laundry, Inc.,* 79 F.2d 326, 328-329 (2nd Cir. 1935); Senate Report No. 1395, 1952 U.S. Code Cong. and Admin. News at 1963; 3 Collier, Bankruptcy (14th Ed.) § 60.43(2).

III

ALTHOUGH NOT DENOMINATED AS A MAJOR ARGUMENT IN THE BRIEF OF THE PETITIONER IN FOOTNOTE 1 ON PAGE 15, THE PETITIONER MAKES CERTAIN STATEMENTS WHICH STRONGLY AFFECT HIS ARGUMENT. THE RESPONDENT DISPUTES THOSE STATEMENTS WHICH INDICATE THAT "A CONDITIONAL VENDEE ACQUIRES NO PROPERTY INTEREST OR OWNERSHIP IN THE GOODS UNTIL HE HAS COMPLIED WITH THE CONDITIONS OF THE CONTRACT."

In *Weiss v. Saffell,* 82 Ariz. 316, 313 P.2d 390 (1957) and *Kahl v. Winfrey,* 81 Ariz. 199, 303 P.2d 256 (1956), the Arizona Courts have spoken about the rights of the seller and buyer and the title those par-

ties have in a conditional sales contract. In the *Weiss* case, *supra,* at page 319 the Court states, "The contract is clearly one of conditional sale; it *merely* provided title was to remain in the seller." (Emphasis supplied.)

In the *Kahl* case, *supra,* at page 205 the Court held a conditional seller must post a bond to repossess property from a conditional vendee under a writ of replevin, and further, that voluntary surrender of possession does not constitute a retaking which would give the vendor full ownership of the property in question. These cases are completely contra to the statement of the Petitioner that, "Upon voluntary return of the goods his possessory right ceases to exist."

IV

THE RESPONDENT ADVANCES THE ARGUMENT THAT TO ALLOW THE PETITIONER THE POSITION IT REQUESTS WOULD BE TO ALLOW A CONDITIONAL VENDOR TO TAKE ADVANTAGE OF A SITUATION WHICH IT CREATED BY ITS FAILURE TO RECORD ITS LIEN AS REQUIRED BY THE STATUTES OF ARIZONA. THIS WOULD ALLOW THE PETITIONER TO HAVE A "SECRET LIEN".

In *Dissing v. Jones,* 85 Ariz. 139, 333 P.2d 725 (1958), the Arizona Court states at page 726:

> "There are two bases upon which the courts hold a seller is estopped to claim the benefits of a recording act: One is that when a seller clothes the purchaser with indicia of complete ownership through misrepresentation, he nullifies its effect as a protection to him against an innocent purchaser.

> The other is the well known equitable doctrine that when one of two innocent parties must suffer, the loss must be borne by the one whose act or omission made the loss possible."

The Court further states at page 728:

> "We are dealing here with a loss arising by reason of unlawful or negligent conduct of the ones claiming the priority."

The situation before the Court is the same as in the *Dissing* case, *supra*. The Petitioner did not comply with the requirements of the State of Arizona and should not be given the priority it seeks.

The quotation from Volume 3, Collier on Bankruptcy at page 995 states the Respondent's position in this case:

> "However, in 1952, Congress resolved any doubts on the question by adding the clause 'the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor' at the end of § 1(30).
>
> "The 1952 amendment to § 1(30) is clearly in line with the policy behind § 60a: to compel public recordation for the benefit of creditors and to strike down, as preferential transfers, transactions whereby the debtor is permitted to retain possession of property as his own when actually it belongs or is incumbered to another by virtue of an undisclosed agreement. This policy is emasculated if, while the Tweedledum mortgage falls as it should, the Tweedledee conditional sale stands. The practical effect flowing from a belated recording of a conditional sale contract within the four months' period, or a complete

lack of recording, or a relinquishment of possession by the debtor within that time, is the same as in the case of the chattel mortgage transactions previously discussed. As stated in the earlier case of *McElvain v. Hardesty* (C.C.A., 8th Cir.), 22 Am.B.R. 320, 169 Fed. 31."

* * * *

"It is not an unreasonable burden to compel conditional vendors to comply with state requirements for public notice; and it is a policy well within the limits of Congressional power to enforce, despite any general substantive aspects of the conditional sales transaction. If the intent of the Act is permitted full scope, the only thing that will insure inviolability of an otherwise valid conditional sale will be prompt fulfillment of state requirements for perfection as against subsequent lien creditors.

"In some states there exist statutes which may be designated as 'sign statutes,' providing that the failure of any person transacting business as a trader or otherwise, to disclse the name of his principal or partner by a sign easily readable and conspicuously placed, will render all property, stock, money, etc., used or acquired in such business liable for his debts and to be treated in all respects as his own. This statute may, in a particular state, be interpreted as applying to conditional vendees (see *Matter of Loeb's, Inc.* (D.C. Miss.), 48 Am.B.R. 126, 279 Fed. 269), and in such a case it can be said that a lack of compliance with the law will compel treatment of the property as the vendee's own, and a later recording of a conditional sale contract itself within the four months' period *or a repossession by the*

vendor within that time may amount to a preferential transfer. Moreover, in some states, even though such a contract were recorded according to law, a lack of compliance with such a sign statute would amount to a failure to perfect the transaction under state requirements as against lien creditors and a repossession within four months of bankruptcy would be preferential if the other elements then existed." (Emphasis supplied.)

CONCLUSION

It is therefore respectfully requested that the Petition for Writ of Certiorari be denied.

Dated, Tucson, Arizona,
May 18, 1966.

Respectfully submitted,
CLAGUE A. VAN SLYKE,
Attorney for Respondent.

(Appendix Follows)

Appendix

United States Bankruptcy Act (11 USC Sec. 96):

Section 1. Meaning of Words and Phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

Section 60. Preferred Creditors. a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

Section 60(a)(7)

Any provision in this subdivision a to the contrary notwithstanding if the applicable law re-

quires a transfer of property other than real property for or on account of a new and contemporaneous consideration to be perfected by recording, delivery, or otherwise, in order that no lien described in paragraph (2) could become superior to the rights of the transferee therein, or if the applicable law requires a transfer of real property for such a consideration to be so perfected in order that no bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee, the time of transfer shall be determined by the following rules:

I. Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer.

II. Where compliance with the law applicable to the transfer is not had in accordance with the provisions of subparagraph I, the transfer shall be deemed to be made or suffered at the time of compliance therewith, and if such compliance is not had prior to the filing of the petition initiating a proceeding under this Act, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition.

Section 60(b)

Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *Provided, however,* That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

Arizona Revised Statutes:

Section 44-301. Definition of terms:

In this chapter:

1. "Conditional sale" means:

(a) Any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer

at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency.

Section 44-304. Conditional sales valid except as otherwise provided.

Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons, except as hereinafter otherwise provided.

Section 44-305. Conditional sales void as to certain persons.

Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, and is void as to all persons except for the buyer unless such contract or copy is so filed within ten days after the making of the conditional sale.

Section 44-309. Conditional sale of goods for resale.

When goods are delivered under a conditional sale contract and the seller expressly or impliedly consents that the buyer may resell them prior to performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them, the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this chapter.

Section 44-329. Uniformity of interpretation.

This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law to those states which enact it.

Statute of Puerto Rico

Title 10, § 33. Sale void as to third parties unless recorded.

Except as otherwise provided in sections 31-41 of this title, all conditions and reservations in a contract for the conditional sale of movable goods and chattels, accompanied by delivery of the thing contracted to be sold to the effect that the ownership of such movable goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees or mortgagees in good faith, or other third parties, and as to them the sale shall be deemed absolute, unless such contract of sale containing such conditions and reservations, or a true copy thereof be filed as directed in sections 31-41 of this title.—Apr. 13, 1916, No. 61, p. 123, § 3, eff. July 1, 1916.

In the United States District Court
for the District of Arizona

No. Civ.-1828 Tucson

H. W. Glessner, Trustee in Bankruptcy of Marvin K. Dunagan, Bankrupt,
Plaintiff,

vs.

Massey-Ferguson, Inc., a corporation, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This action having been tried upon the facts by the court, sitting without a jury, the court does hereby find the facts and states separately its conclusions of law thereon, and directs the entry of judgment, as follows:

FINDINGS OF FACT

1. Plaintiff is the duly appointed, qualified, and acting Trustee in Bankruptcy of the Estate of Marvin K. Dunagan, Bankrupt, No. B-3514 Tucson.

2. That Marvin K. Dunagan was adjudged bankrupt on June 14, 1963.

3. That on or about April 12, 1963, defendant, Massey-Ferguson, Inc., retook or received from the bankrupt the equipment and parts described in the pretrial order filed herein on July 20, 1964.

4. That the equipment so retaken or received by defendant had come into the possession of the bankrupt and was held by him at Willcox, Cochise County, Arizona, on or about April 12, 1963, under and pursuant to the terms and provisions of a Dealer Wholesale Note and Invoice similar in tenor and effect to plaintiff's Exhibit 4, in evidence. That the parts so retaken or received by defendant (with the exception of a lot of parts having an invoice value of $1,739.35, purchased by bankrupt from Roy Young in October, 1962), had come into the possession of the bankrupt and were held by him at Willcox, Cochise County, Arizona, on or about April 12, 1963, under and pursuant to the terms and provisions of a Dealer Sales Agreement similar in tenor and effect to plaintiff's Exhibit 1, in evidence.

5. That at the time defendant retook the parts and equipment, defendant was a creditor of the bankrupt. That the equipment and the parts, other than the parts purchased by bankrupt from Roy Young, were retaken by defendant under a claim of ownership of such equipment and parts by virtue of the terms of the respective Dealer Wholesale Note and Invoice and Dealer Sales Agreement documents. That defendant took possession of the parts which bankrupt had purchased from Roy Young in October, 1962, as a payment on account of indebtedness owing by bankrupt to defendant.

6. That the documents, viz: Dealer Sales Agreement and Dealer Wholesale Note and Invoice, pursuant to which bankrupt came into possession of the equipment and parts above described were not recorded or filed at any time in the office of the County Recorder of Cochise County, Arizona. No evidence in the case indicates that notice of the contents of such documents was given to other creditors of bankrupt. No person purchased any interest in or to such equipment or parts, and no creditor of the bankrupt acquired by attachment or levy any lien upon such equipment or parts, or any part thereof, prior to the retaking or receipt of the equipment and parts by defendant on or about April 12, 1963.

7. That on or about April 12, 1963, Marvin K. Dunagan was insolvent and defendant had reasonable cause to believe that he was insolvent.

8. To the extent of the parts which had been acquired by bankrupt from Roy Young and were taken by defendant on or about April 12, 1963, and to the extent of $1,739.35, the retention of such parts by defendant enabled it to receive as payment a greater percentage of its debt than other creditors in the same class.

CONCLUSIONS OF LAW

1. That the transactions whereby bankrupt obtained equipment and parts from defendant pursuant to Dealer Wholesale Note and Invoice agreements and Dealer Sales Agreements were conditional sales between the parties, Paragraph 1(a), Section 44-301,

A.R.S.; and title to such equipment and parts so obtained by bankrupt and thereafter retaken on or about April 12, 1963, by defendant from bankrupt, at all times remained in defendant.

2. That defendant received a preference to the extent of $1,739.35, invoice value of the parts purchased by bankrupt from Roy Young in October, 1962, within the meaning of the Bankruptcy Act.

3. That the transaction between defendant and bankrupt whereunder defendant retook the equipment and parts, other than the parts purchased by bankrupt from Roy Young in October, 1962, did not amount to a preference to defendant and did not constitute a transfer by bankrupt which, under federal or state law, was fraudulent as against or voidable by any creditor or bankrupt having a claim provable in bankruptcy.

JUDGMENT

Now on this 17 day of September, 1964,

It Is Ordered And Adjudged that plaintiff, H. W. Glessner, Trustee in Bankruptcy of Marvin K. Dunagan, Bankrupt, have judgment against Massey-Ferguson, Inc., a corporation, for the sum of $1,739.35, together with plaintiff's costs of suit herein.

James A. Walsh
United States District Judge

United States Court of Appeals
for the Ninth Circuit

H. W. Glessner, Trustee in Bankruptcy of Marvin K. Dunagan, Bankrupt,
Appellant,

vs.

Massey-Ferguson, Inc., a corporation, et al.,
Appellees.

No. 19,778

[December 13, 1965]

Appeal from the United States District Court
for the District of Arizona

Before: HAMLEY and BROWNING, Circuit Judges, and MATHES, Senior District Judge

MATHES, Senior District Judge:

The trustee in bankruptcy of Marvin K. Dunagan, one-time farm implement dealer at Willcox, Arizona, appeals from the District Court's judgment denying the trustee's claim to certain equipment and parts, or the value thereof, which were repossessed from the bankrupt by appellee Massey-Ferguson under certain conditional sales contracts within the four-month period next preceding the filing of Dunagan's voluntary petition in bankruptcy.

The material facts, as found by the District Court, are not in dispute, and may be summarized as follows:

The bankrupt came into possession of the equipment and parts in question pursuant to a "Dealer Wholesale Note and Invoice", and certain "Dealer Sales Agreements" between Massey-Ferguson and the bankrupt, which admittedly amounted to contracts of conditional sale under Arizona law. On April 12, 1963, some two months prior to bankruptcy, appellee repossessed the personal property in controversy "under a claim of ownership" as seller, by virtue of the conditional sale contracts which had reserved title in the appellee until full payment of the purchase price.

The contracts of conditional sale were never filed for record in Arizona. The bankrupt had never sold or agreed to sell any of the property to any purchaser, and none of the bankrupt's creditors had placed any lien thereon, prior to appellee's repossession. Moreover, at the time the property was so repossessed by appellee, the bankrupt was insolvent and appellee had reasonable cause to believe that the bankrupt was insolvent.

The sole question presented upon this appeal is whether the District Court correctly decided that the trustee was not entitled to reclaim the repossessed property under §§70c, or 70e(1), or 60b, of the Bankruptcy Act. [11 U.S.C. §§110(c), 110(e)(1), 96(b).]

Turning first to §70c, we note that the oft-called "strong-arm" clause of the section provides that:

> "The trustee, as to all property, whether or not coming into possession or control of the Court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested

as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

We note also that the Bankruptcy Act leaves the §70c question, whether "a creditor of the bankrupt could have obtained a lien" on the property at the date of bankruptcy, to be determined by State law, here the law of Arizona. [See: *Corn Exchange Nat. Bank & Tr. v. Klauder,* 318 U.S. 434 (1943); *Bryant v. Swofford Bros. Dry Goods Co.,* 214 U.S. 279 (1909); *In re Rosenberg Iron & Metal Co.,* 343 F.2d 527 (7th Cir. 1965); *In re Kellett Aircraft Corp.,* 173 F.2d 689 (3rd Cir. 1949).]

Arizona law recognizes as valid contracts of conditional sale of personal property which reserve title to the goods in the seller. [Ariz. Rev. Stat. §§44-301, 44-304.] However, these contracts are made subject to §44-305 which declares that:

"Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment, or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, and is void as to all persons except for the buyer unless such contract or copy is so filed within ten days after the making of the conditional sale." [Ariz. Rev. Stats. §44-305.]

In *Castaneda v. National Cash Register Co.,* 43 Ariz. 119, 29 P.2d 730 (1934), the Arizona Supreme

Court considered the phraseology of §2890 of the Revised Code of 1928, which is identical in relevant portions to the above-quoted provisions of §44-305 of the Revised Statutes, and held that the phrase "and is void as to all persons except for the buyer" could not be reconciled with the provisions immediately preceding it. In this connection, the Arizona Court said:

> "Of course the Legislature did not intend to protect the seller's reserved property in one sentence and to invalidate such property under precisely the same facts in the next sentence. Effect cannot possibly be given to both these legislative expressions. One or the other, we must assume, expressed what the Legislature in fact and in truth intended. . . . [W]e must conclude that it intended to preserve [§5 of the Uniform Conditional Sales Act] as originally passed." [43 Ariz. at 125, 29 P.2d at 732.]

Section 5 of the Uniform Conditional Sales Act was orginally enacted in Arizona as §5, ch. 40 of the Laws of 1919, the language of which was identical to later §2890, except that §5 did not contain the phrase "and is void as to all persons except for the buyer", but simply provided that the reservation of title in a conditional seller was void only as against purchasers and lien creditors who acquired their interests before the contract was filed for public record. And in the *Castaneda* case, the Arizona Court cited with approval the following comments of the Commissioners on Uniform State Laws:

> "The purchasers and creditors have a right to demand that there shall be a record at the time

> they buy or acquire a lien, but they have no right to complain if the record was made twenty days after the delivery of the goods, instead of ten days, so long as it was made prior to their acquisition of a claim against the goods. It was certainly the intention of the Commissioners on Uniform State Laws to make a filing in twenty or thirty days after the making of the contract, valid as against all purchasers from the buyer subsequent to the filing and against all creditors of the buyer levying or attaching after the filing. The matter was fully discussed. The intent of the Commissioners was undoubtedly explained by them to the legislatures of the various states which have adopted the Act, and so has become the legislative intent." [*Castaneda v. National Cash Register Co., supra,* 43 Ariz. at 123, 29 P.2d at 732; see 2A Uniform Laws Ann. 90.]

In the case at bar, although the conditional sales agreements were never filed for public record, admittedly no buyer purchased any interest in the property and no creditor obtained a lien thereon prior to appellee's repossession. Arizona law treats repossession as the legal equivalent of filing for public record; and justly so, since no creditor or purchaser could thereafter rely upon the debtor's apparent ownership of the property. [*Moore v. Chilson,* 26 Ariz. 244, 224 P. 818 (1924).]

Under Arizona law, then, the only person who could defeat appellee's rights in the repossessed property here would be required to qualify, either as a purchaser of the property without notice of the condi-

tional sale agreements, or as a creditor who had acquired a lien by attachment or levy without such notice, before the repossession occurred.

As the Court explained in *Lewis v. Manufacturers Nat. Bank,* 364 U.S. 603 (1961), the trustee acquires under §70c of the Act the rights of a hypothetical creditor "then holding a lien" as of the time of filing of the petition in bankruptcy; but the trustee may not reach back to some "anterior point of time" and assert the rights of a creditor at such "anterior point of time". The District Court correctly concluded, therefore, that §70c of the Act was inapplicable at bar, since no creditor, actual or hypothetical, "could have obtained a lien" on the property "at the date of bankruptcy". [Cf. *Pacific Finance Corp. v. Edwards,* 304 F.2d 224 (9th Cir. 1962).]

Furthermore, as the learned District Judge pointed out, the absence of any purchaser or attending creditor prior to repossession prevents the trustee from recovering under §70c(1) of the Act [11 U.S.C. §110 (e)(1)], no transfer of the repossessed property having been made or suffered by the debtor which was "fraudulent as against or voidable for any other reason by any creditor of the debtor" under the law of Arizona.

There remains to be considered, then, what rights the appellant trustee had under §60 of the Bankruptcy Act. [11 U.S.C. §96.] The precise question is whether appellee's repossession of the property amounted to voidable preference within the provisions of §60.

Section 60a(1) defines a preference to be:

> ". . . a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class." [11 U.S.C. §96(a)(1).]

And §60b declares such a transfer voidable at the suit of the trustee, if the creditor knew or had reasonable cause to believe that the debtor was insolvent at the time the transfer was made. [11 U.S.C. §96(b).]

Under the 1910 version of §60b [36 Stat. 838], the Supreme Court held that tardy filing for public record of an agreement of conditional sale, within the four-month period preceding bankruptcy, did not constitute a preferential transfer. [*Bailey v. Baker Ice Machine Co.*, 239 U.S. 268 (1915).] The rationale of the court's holding was that, under a conditional sales contract, where title to the property does not pass to the buyer until fulfillment of the conditions of sale, the seller's later repossession of the property will not operate as a "transfer" of "any of the property of a debtor", even though the agreement of conditional sale was never filed for public record. The Court observed that: "The property to which it [the contract] related was not [the conditional vendee's] but [the conditional vendor's]". [*Bailey v. Baker Ice Machine Co., supra*, 239 U.S. at 274; and see: *Finance & Guaranty*

Co. v. Oppenheimer, 276 U.S. 10 (1928); *Guaranty Security Corp. v. Reed,* 299 F. 265 (1st Cir. 1924); *Big Four Implement Co. v. Wright,* 207 F. 535 (8th Cir. 1913).]

However, the 1950 and 1952 amendments to the Bankruptcy Act convince us that the *Bailey* doctrine no longer subsists. In 1950, the Congress amended §60 to define more precisely the time of a "transfer" within the meaning of §60(a) and (b), by providing in §60a(2) that:

> "For the purposes of subdivisions (a) and (b) of this section [60], a transfer of property other then real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." [64 Stat. 24 (1950); 11 U.S.C. §96(a)(2).]

Section 60a(7)(I) allows the creditor twenty-one days, unless the State law fixes a shorter period of time, within which to perfect the creditor's interest so that no lien described in §60a(7)(II) can become superior to the creditor's rights in the property. [11 U.S.C. §96(a)(7)(I).] And §60a(7)(II) provides:

> "Where compliance with the law applicable to the transfer is not had in accordance with the provisions of sub-paragraph I, the transfer shall be deemed to be made or suffered at the time of compliance therewith." [11 U.S.C. §96(a)(7)(II).]

In 1952, the Congress amended §1(30) to include a contract of conditional sale within the statutory defi-

nition of a "transfer" by expressly declaring that "the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor." [66 Stat. 42 (1952), 11 U.S.C. §(30).]

The 1950 and 1952 amendments to the Bankruptcy Act do not, it is true, explicitly disavow the *Bailey* doctrine that rights embraced within a title interest retained by the conditional seller are not "property" of the vendee-debtor, the legislative history of the amendments persuades us that the Congressional intent was to repudiate unequivocally the *Bailey* rationale. Before recalling the Congressional reports on the amendments, we should first refer to an earlier footnote to the 1943 opinion in *Corn Exchange Nat. Bank & Tr. Co. v. Klauder, supra,* 318 U.S. 434, wherein the Court referred to the testimony of Professor McLaughlin at Congressional hearings held prior to the 1938 Chandler-Act amendments, as follows:

> "He stated *Thompson v. Fairbanks,* 196 U.S. 516 . . . as applying a rule of state law that a mortgagee by taking possession of the mortgaged property at a time subsequent to the execution of the mortgage thereby validated it as of the time of execution. He said that §60a would prevent such validation by relation back. Similar disapproving reference was made to *Bailey v. Baker Ice Machine Co.,* 239 U.S. 268. . . ." [318 U.S. at 438, n. 11.]

The 1949 Report of the Judiciary Committee of the House (H.R. Report No. 1293, 81st Congress, 1st Sess., to accompany S. 88), dealing with the proposed 1950 amendments, declared:

"In *Sexton v. Kessler* (1912) 225 U.S. 90, the Supreme Court, under the language of the Bankruptcy Act prior to the 1938 amendment, recognized as valid a pledge of stocks and bonds consummated within the 4-month period, at a time when the pledgor was insolvent, because a promise to make a pledge had been made before the commencement of the 4-month period. This result was reached on the doctrine of 'relation back.'

"Similarly, in *Carey v. Donohue* (1916) 240 U.S. 430, the Supreme Court recognized as valid an unrecorded deed to real estate, on the ground that the applicable State statute did not make such a deed invalid as against judgment creditors. The *Carey* case, accordingly, became known as the 'pocket lien' case.

"Other cases, substantially to the effect of one or the other of these two, are *Bailey v. Baker Ice Machine Co.* (1915) 239 U.S. 268; *Martin v. The Commercial Bank* (1918) 245 U.S. 513; and *Bunch v. Maloney* (1918) 246 U.S. 658.

"In 1938 the Bankruptcy Act was amended to obviate the effect of these cases, which were regarded with disfavor by the great majority." [1950 U.S. Code Cong. Service 1985, 1986; See Bankruptcy Act §60a(6); 11 U.S.C. §96(a)(6).]

Next came the Senate and House report on the 1952 legislation, to "clarify" the definition of "transfer" in §1(30) of the Bankruptcy Act, stating:

"Section 1(h) of the bill adds a sentence to the definition of 'transfer' in section 1(30) of the act to clarify it. Notwithstanding the apparently sweeping language of the present definition

> of transfer, there is a chance that it would be held insufficient to cover the security interest reserved in the grantor by conditional sale, lease, or bailment transaction with the debtor, because such interests are not the results of transfers made by the debtor, although they usually perform the same function as a transfer made by him for the purpose of security. *Bailey v. Baker Ice Machine Co.*, 239 U.S. 268 (1915), held that a conditional sale to the debtor could not be a preferential transfer, because it was not made by the debtor. Since [1950] the amendment of section 60, it is clear that a preferential transfer may be suffered by the debtor but the generality of the present definition is clarified by the declaration that such a reserved interest may be a transfer suffered by the debtor." [Senate Report No. 1395, April 2, 1952 (to accompany S. 2234), 1952 U.S. Code Cong. and Admin. News 1960, 1963.]

Accordingly, appellee's retained "security title" here must be deemed to be "a transfer . . . of the property of a debtor . . . suffered by such debtor" [§60a(2); 11 U.S.C. §96a(2)] on April 12, 1963, when appellee repossessed the property in controversy. For prior to this repossession, the property was subject to the claims of all purchasers from and all creditors of the buyer who might have obtained a lien thereon in accordance with the law of Arizona, without actual or constructive notice of the seller's retained "security title", inasmuch as the conditional sale agreements covering the property had never been filed for public record as required by Arizona law. [Ariz. Rev. Stat. §44-305.].

We hold, therefore, that appellee's failure to file the contracts of conditional sale for public record, as required by §44-305 of Arizona's Revised Statutes, made the later repossession of the property in question a transfer of the debtor's interest in such property, "for or on account of an antecedent debt", created at the time of the making of the contract of conditional sale, and thus depleted the estate of the bankrupt to the extent of the value of the debtor's property rights so transferred.

Next it is necessary to consider whether this transfer, so "suffered by such debtor", enabled appellee to obtain a greater percentage of its debt than some other creditor of the same class, in contravention of §60 of the Act. Appellee contends that the "class" referred to in §60a includes only creditors holding claims arising from contracts of conditional sale, and not unsecured creditors of the bankrupt. We do not agree. While "class" is not expressly defined in the Bankruptcy Act, it appears that the general purpose of §60 was not only to enable the trustee in bankruptcy to strike down "secret liens", but also to require prompt perfection of security interests in order to provide timely and adequate notice to other creditors. [See: *Corn Exchange Nat. Bank & Tr. Co. v. Klauder, supra,* 318 U.S. at 438-439; Bankruptcy Act §60a(6), 11 U.S.C. §96(a)(6); 3 Collier, *Bankruptcy* (14th Ed.) §60.38(1).] Manifestly, if conditional vendors were the only creditors to be included within the "class" in question here, those purposes would be largely defeated.

It follows then that repossession by the appellee of the property subject to the conditional sale agreements, under the circumstances here and within the four-months period next preceding filing of the petition in bankruptcy, must be held to be a preference under §60b of the Bankruptcy Act. [11 U.S.C. §96b.]

This conclusion is buttressed by the fact that, since the 1950 and 1952 amendments to the Bankruptcy Act, both the Court of Appeals of the Second Circuit and the Court of Appeals of the Fifth Circuit have in effect held that the doctrine of *Bailey v. Baker Ice Machine Co., supra,* 239 U.S. 268, has been "repealed". [See: *Sims v. Capitol Refrigeration Co., Inc.,* 294 F. 2d 111 (2d Cir. 1961): *In re Morasco,* 233 F.2d 11 (2d Cir. 1956); *B. F. Avery & Sons Co. v. Davis,* 226 F.2d 942 (5th Cir. 1955).] Furthermore, as we read them, the reported decisions of the District Courts on the subject are in accord with this view. [See: *Brown v. American Trust Co.,* 186 F.Supp. 249 (N.D. Cal. 1960); *In re Huston,* 143 F.Supp. 40 (N.D. Ohio 1956); *In re Kaufman,* 142 F.Supp. 759 (W.D. Ky. 1956); *In re Burton,* 120 F.Supp. 148 (D. Md. 1954); and see *Dinkelspiel v. Garrett,* 96 F.Supp. 800 (W.D. Ark. 1951).]

On the other hand, the Court of Appeals of the First Circuit appears to continue of the opinion that the *Baker* doctrine still rules a situation such as that presented at bar. In so holding, the First Circuit seems to rely upon *Finance & Guaranty Co. v. Oppenheimer, supra,* 276 U.S. at 12, which we think must surely fall with *Baker* in the face of the 1952 Congressional declaration in §1(30) of the Act, that "re-

tention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor . . ." [See *Carina Mercury, Inc. v. Igaravides,* 344 F.2d 397 (1st Cir. 1965).]

Our high regard for the acumen of the Court of Appeals of the First Circuit gives us pause, but we remain nonetheless convinced that both reason and policy, as well as legislative history, sustain our conclusion, that under the circumstances at bar, repossession by a conditional seller of property subject to a conditional sale agreement, within the four-months period next preceding filing of the petition in bankruptcy, constitutes a preference recoverable by the trustee under §60b of the Bankruptcy Act [11 U.S.C. §96(b).]

This view finds further support in the fact that the result avoids the anomaly of allowing the security interest of a conditional seller to stand invincible while, under similar circumstances, the security interest of a chattel mortgagee is held voidable by the trustee in bankruptcy. [Compare: *McKnight v. M. & J. Finance Corp.,* 247 F.2d 112 (4th Cir. 1957) and *England v. Moore Equipment Co.,* 94 F. Supp. 532 (N.D. Cal. 1950), with *Bailey v. Baker Ice Machine Co., supra,* 239 U.S. 268. See L. Hand, J., dissenting in *In re Lake's Laundry, Inc.,* 79 F.2d 326, 328-329 (2nd Cir. 1935); Senate Report No. 1395, *supra,* 1952 U.S. Code Cong. and Admin. News at 1963; 3 Collier, *Bankruptcy* (14th Ed.) §60.43(2).]

The judgment appealed from is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco, California 94101

December 23, 1965

Mr. Wayne Davies
Editorial Counsel
West Publishing Company
St. Paul 2, Minnesota

H. W. Glessner, Trustee in Bankruptcy
v. Massey-Ferguson, Inc. No. 19,778

Dear Mr. Davies:

The printed opinion of this court was rendered and filed on December 13, 1965, and a copy sent to you for publication in the Federal Reporter. May I ask you to attend to the following corrections in the opinion before publication:

1. On p. 3, line 3 of the first full paragraph, the word "phraseology" should begin with a lower case "p."

2. On p. 6, second line from the bottom, the word "but" should be inserted after "vendee-debtor," and before "the legislative history."

3. On p. 8, line 13 of the full paragraph, quotation should read "Since the [1950] amendment," instead of "Since [1950] the amendment."

4. On p. 10, second line from the bottom of the first full paragraph, the punctuation should be amended to read as follows: "such debtor." " instead of such debtor . . ." "

Please acknowledge receipt hereof.

Very truly yours,

cc all counsel. Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 19,778

H. W. Glessner, Trustee in Bankruptcy of Marvin K. Dunagan, Bankrupt,
Appellant,

vs.

Massey-Ferguson, Inc., a corp., et al.,
Appellees.

Appeal from the United States District Court
for the District of Arizona

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court, with costs in this court in favor of the appellant and against the appellees.

COSTS:

Clerk's Docket Fee:	$25.00
Rept. record	$33.36
Total	$58.36

Filed and entered December 13, 1965.